

## RISK MANAGEMENT TOOLS FOR ADDRESSING ENVIRONMENTAL RISKS IN PROPERTY TRANSACTIONS

INDEMNIFICATION	
<b>Description</b>	<ul style="list-style-type: none"> <li>• An agreement that provides for one party to bear the costs, either directly or by reimbursement, for damages or losses incurred by a second party</li> <li>• Generally environmental indemnifications must be drafted with care and specificity in order to be upheld and enforceable in court actions (judicial interpretations may vary from state to state)</li> </ul>
<b>Purpose / Legal Function</b>	<ul style="list-style-type: none"> <li>• Used to allocate certain environmental risks and liabilities</li> <li>• Does not prevent government agency from asserting direct liability claims for remediation costs /environmental enforcement actions against indemnified party</li> <li>• May be supported by financial mechanisms such as escrow funds, hold backs, letters of credit, bonds or environmental insurance policies</li> </ul>
<b>Sample Language<sup>1</sup></b>	<p>Seller agrees to indemnify, protect, defend (with counsel reasonably acceptable to Purchaser), and hold harmless Purchaser from and against any and all losses, damages, liabilities, costs, expenses, and demands (including attorneys', consultants', and experts' fees) suffered or incurred by Purchaser as a result of: I. Any and all violations of Environmental Laws or releases of Hazardous Materials in connection with the performance of the Remediation Work (excluding, however, violations, releases, or events to the extent caused by the negligence of Purchaser or Purchaser's contractor or agents) . . . <sup>5</sup></p>
<b>Key Issues</b>	<ul style="list-style-type: none"> <li>• Types of costs covered (e.g., actual, incidental, consequential, discretionary, defense)</li> <li>• Caps on amount of the indemnification</li> <li>• Deductibles (only amounts above deductible can be claimed)</li> <li>• On-site versus off-site liabilities</li> <li>• Thresholds (coverage for full amount, if claim exceeds specific value)</li> <li>• Time limits for indemnification</li> <li>• Mediation of disputes over indemnification provisions</li> <li>• Predecessor operations</li> <li>• Cost sharing arrangements (provides incentive to work toward most cost-effective solutions)</li> <li>• Financial mechanisms to support indemnification (e.g., escrow, letters of credit, bonds, third-party insurance, or "hold backs" deferred payment of portion of purchase price)</li> </ul>

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REPRESENTATIONS AND WARRANTIES (R&Ws)	
<b>Description</b>	Statements of fact (representations) and promises (warranties) that a seller makes to a buyer.
<b>Purpose / Legal Function</b>	<ul style="list-style-type: none"> <li>Typically provided by seller to disclose environmental risks associated with acquisition of business or some or all of its assets.</li> <li>When used with indemnification, R&amp;Ws also may allocate risk for environmental conditions and liabilities among parties to a contract. The goal of these terms is adequate disclosure of material risks and issues.</li> </ul>
<b>Sample Language<sup>1</sup></b>	Except as described in Schedule [F], there are no present or [to the knowledge of the Seller] past actions, activities, circumstances, conditions, events or incidents, including without limitation, any Release of any Hazardous Materials, that could form the basis for assertion of any [material] Environmental Liability against Seller, Buyer, the Business or any property used therein or [to the knowledge of Seller] against any Predecessor <sup>2</sup> .
<b>Key Issues</b>	<ul style="list-style-type: none"> <li>Duration (whether and how long R&amp;Ws survive closing)</li> <li>Scope of due inquiry (extent of seller's obligation to collect information)</li> <li>Predecessor operations (whether R&amp;Ws cover predecessor and other third party operations on seller's property)</li> <li>Scope of issues covered (including whether seller's R&amp;Ws cover all environmental liabilities or only liabilities arising from violations or arising from on-site conditions)</li> </ul>
ASSUMPTION, RETENTION, AND RELEASE PROVISIONS	
<b>Description</b>	Buyer accepts, or seller retains, responsibility for known or unknown environmental conditions and releases the other party from liability for current and future claims arising from the specified conditions.
<b>Purpose / Legal Function</b>	<ul style="list-style-type: none"> <li>Buyer and seller allocate risk or liability for certain conditions</li> <li>Typically used to allocate risk of future liability for currently existing but unknown conditions</li> </ul>
<b>Sample Language<sup>1</sup></b>	<ol style="list-style-type: none"> <li>Purchaser hereby releases seller from any and all liability to remediate or respond to any release of a [regulated substance] arising from [listed conditions or including unknowns]</li> <li>Purchaser, on behalf of itself and its successors and assigns, hereby releases seller from any losses, damages, obligations, demands, or claims relating to [listed conditions]<sup>4</sup></li> </ol>
<b>Key Issues</b>	<ul style="list-style-type: none"> <li>Sample 1 (simple release by buyer) may not protect seller from liability to subsequent buyers</li> <li>Sample 2 protects seller from liability to tenants, later buyers, and other successors to original buyer's interest in the property</li> <li>Seller would not be protected against third party claims for known or unknown conditions without an indemnification by the buyer for such claims</li> </ul>

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COVENANTS	
<b>Description</b>	Promise or agreement by seller or buyer to do, or refrain from doing, an act.
<b>Purpose / Legal Function</b>	<ul style="list-style-type: none"> <li>• Allocate responsibility for tasks, particularly elements of the cleanup, transferring permits, continued operations of assets, and compliance with environmental laws, or to not take any action such as dispose of hazardous substances after a specified date (often closing)</li> <li>• Seller may seek a restrictive covenant from the buyer to not use the property for certain purposes such as residential, or to not withdraw groundwater</li> </ul>
<b>Sample Language<sup>1</sup></b>	Seller shall, at its sole cost and expense, take or cause to be taken all actions necessary to . . . ensure that as of the closing date the Site, all activities and operations thereon, and all alterations and improvements thereto, comply with all applicable Environmental Laws and with any and all agreements with governmental agencies, court orders, and administrative orders regarding Environmental Conditions . . . <sup>3</sup>
<b>Key Issues</b>	<ul style="list-style-type: none"> <li>• Limitations on liability or conditions for action</li> <li>• Scope and duration of the obligation</li> <li>• Thresholds for action may need to be specified</li> <li>• Strict schedule for performance if parties are allocating responsibility for certain tasks</li> </ul>
INCLUDED OR EXCLUDED LIABILITIES	
<b>Description</b>	Identifies and allocates between seller and buyer particular risks associated with the business and some or all of the assets and liabilities and specifies whether they are included in or excluded from the risks allocated in the transaction.
<b>Purpose / Legal Function</b>	Allocates specified liabilities to buyer (included) or seller (excluded)
<b>Sample Language<sup>1</sup></b>	No sample language available
<b>Key Issues</b>	<ul style="list-style-type: none"> <li>• Will not affect governmental agencies' ability or inclination to assert claims against indemnified party, particularly under CERCLA or similar state statutes</li> <li>• Litigation defense costs for claims that were expressly excluded from one party and assumed by the other party</li> </ul>

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"AS IS" SALE	
<b>Description</b>	Express statement that seller makes no representations or warranties about the condition of the property.
<b>Purpose / Legal Function</b>	<ul style="list-style-type: none"> <li>• Intended to preclude buyer from recovering damages from seller for known or unknown conditions at time of sale (judicial interpretations may vary from state to state)</li> <li>• To assist enforceability, specific environmental conditions, including latent defects should be disclosed to buyer, and indemnification should expressly state that the property transfer includes all risks associated with listed federal and state environmental laws</li> </ul>
<b>Sample Language<sup>1</sup></b>	Purchaser acknowledges to and agrees with seller that purchaser is purchasing the property in an "as-is" condition and specifically and expressly without any warranties, representations or guarantees, either express or implied, of any kind, nature, or type whatsoever from or on behalf of seller except as otherwise expressly set forth in this agreement <sup>6</sup>
<b>Key Issues</b>	<ul style="list-style-type: none"> <li>• May not preclude CERCLA contribution action by buyer against seller</li> <li>• Does not operate against third party, including government, claims</li> <li>• Allocates liability under state law</li> <li>• Obligation to investigate the site rests on the buyer</li> </ul>
SCHEDULES	
<b>Description</b>	A list of matters excluded or included from specific provisions in an acquisition agreement.
<b>Purpose / Legal Function</b>	<ul style="list-style-type: none"> <li>• Typically used to list any exclusions or exceptions from an acquisition agreement, including in many cases the R&amp;Ws that are made by seller</li> <li>• Provides format for more specific language than used in text of agreement</li> <li>• Can also be used to allocate/fix liabilities for scheduled items</li> </ul>
<b>Sample Language<sup>1</sup></b>	List or description of items specific to particular transaction
<b>Key Issues</b>	<ul style="list-style-type: none"> <li>• Agreement Specific</li> <li>• Important items should be listed because Schedules are often used to establish a record about the basis of the bargain between the parties, and then used subsequently if a dispute arises</li> </ul>

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POST-SIGNING AND PRE-CLOSING CONDITIONS	
<b>Description</b>	The requirement that some act be performed by a party to an agreement before closing the transaction.
<b>Purpose / Legal Function</b>	<ul style="list-style-type: none"> <li>Establishes certain conditions that must be met, typically by the seller, prior to closing; May allow party to “back out” of deal or adjust purchase price or other terms, if conditions not met</li> <li>May provide buyer with opportunity to perform environmental audit or investigation</li> </ul>
<b>Sample Language<sup>1</sup></b>	Purchaser’s obligation to close hereunder shall be subject to Purchaser, at Purchaser’s sole cost and expense, inspecting or causing an inspection to be made by qualified professionals on Purchaser’s behalf of the Property and other assets described herein, including at Purchaser’s option, environment inspections or tests for hydrocarbons or for any toxic hazardous substances. <sup>7</sup>
<b>Key Issues</b>	<ul style="list-style-type: none"> <li>Basis for contract termination (e.g., assessment that indicates environmental conditions requiring investigation / cleanup actions anticipated to cost above certain threshold)</li> <li>Basis for contract modification (e.g., adjustment of purchase price based on environmental assessment)</li> <li>Mechanisms for providing assurance to seller performing remedial work that transaction will be completed (e.g., escrow)</li> <li>Cost sharing provisions for investigatory and remedial work; Extent of remedial work including whether approvals needed from regulators</li> <li>Site access for remedial work</li> </ul>

## ENDNOTES

1. The samples provided do not necessarily cover all issues within the scope of a particular tool.
2. ELIZABETH GLASS GELTMAN, *SHIFTING ENVIRONMENTAL RISK*, 142 (1999).
3. Caron, Gerard A., "Structuring the Transaction to Allocate Environmental Liability," in *ENVIRONMENTAL ASPECTS OF REAL ESTATE TRANSACTIONS*, 265 (James B. Witkin ed. 1995).
4. R. Timothy Weston and Craig P. Wilson, in *BROWNFIELDS LAW AND PRACTICE*, §7.12[2][c] (Michael P. Gerrard ed. 1999).
5. *Shifting Environmental Risk* at 315.
6. *Id.* at App. I[13] 5.04. *See also* Geltman, *supra* note 1 at 162 ("No representations or warranties have been made by the Seller or anyone in Seller's behalf to the Purchaser as to the condition of the premises or the improvements, and it is understood and agreed that the premises are sold "as is" at the time this Agreement is closed.").
7. *Shifting Environmental Risk* at 6.

## BIBLIOGRAPHY

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